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240-453—66——1

CITATIONS

Cases:

Statute involved:

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 206

HOUSTON INSULATION CONTRACTORS ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 413

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 232–242) is reported at 357 F. 2d 182. The Board's decision and order (R. 176–191; 197–204) are reported at 148 NLRB 866.

JURISDICTION

The judgment of the court of appeals was rendered on March 9, 1966, and a decree was entered on

March 31, 1966 (R. 232, 243). On June 8, 1966, Mr. Justice Black extended the Board's time for filing a petition for certiorari to and including August 6, 1966 (R. 245). The Association's petition for certiorari (No. 206) was filed on June 6, 1966, and the Board's petition (No. 413) was filed on August 4, 1966. On October 10, 1966, both petitions were granted (R. 245–246). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A group of employers and a union have a collective bargaining agreement which contains a clause prohibiting the employers from contracting out work ordinarily performed by their employees. In violation of the agreement, two employers purchase products incorporating such work, and their employees are induced to refuse to handle these products—in one case, by the union which is a party to the agreement, and in the other, by a sister local, which is not a party to the agreement. The questions presented in No. 206 are as follows:[1]

1. Whether a clause in a collective bargaining agreement prohibiting an employer from contracting out work ordinarily performed by his employees is outside the reach of Section 8(e) of the National Labor Relations Act (which bans "hot cargo" and other types of secondary agreements), since a work preservation clause which is primary in nature.

[1] By agreement of the parties, each will file a single brief directed to the issues presented in both Nos. 206 and 413.

2. Whether substantial evidence supports the Board's finding that the unions' objective in inducing the employee refusals was to enforce such lawful work preservation clause.

3. Whether the inducement of such refusals by the union which is a party to the agreement is outside the ambit of Section 8(b)(4)(B) of the Act (which proscribes only secondary activity), since directed toward enforcement of a lawful work preservation clause.

No. 413 presents this further question:

4. Whether the inducement of such refusals by the union not a party to the agreement is similarly not banned by Section 8(b)(4)(B), where that union represents other employees of the same employer, where its only dispute is with that employer and no pressure is exerted against third parties, and where its objective is merely to aid the contracting union in enforcing a lawful work preservation clause of its agreement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix, *infra*, pp. 31–33.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. Houston Insulation Contractors Association (hereinafter "Association"), a group of contractors in the Houston area, bargains on a joint basis and has a collective bargaining agreement with Local 22 of the International Association of Heat and Frost In-

sulators and Asbestos Workers, AFL–CIO (R. 179; 31). Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation are members of the Association and signatories to the agreement (R. 179; 31). That agreement provides, in pertinent part (R. 179–180; 136, 142):

ARTICLE VI

The Employer agrees that he will not sublet or contract out any work described in Article XIII * * *.

* * * * *

ARTICLE XIII

The Agreement covers the rates of pay rules and working conditions of all Mechanics and Improvers engaged in the preparation, distribution and application of pipe and boiler coverings, insulation of hot surfaces, ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same and all other work included in the trade jurisdictional claims of the Union.

This to include alterations and repairing of work similar to the above and the use of all materials for the purpose mentioned.

2. Over a period of years, Johns-Manville had purchased from Techalloy Company stainless steel bands and other materials for use in installing insulation materials (R. 182; 38; 11–12). In the past, Techalloy had delivered coils or rolls of wire to Johns-Manville. Bands were then cut to size by Johns-Manville employees, represented by Local 22, and used to fasten

insulation material to pipes (R. 199–200; 14–15; 60; 104–105).

In July 1963, Johns-Manville was engaged in a construction project for an oil company at Texas City, Texas. In connection with the performance of its contract, Johns-Manville purchased from Techalloy bands which had been pre-cut to specification by Techalloy employees (R. 182, 200; 12–13). When the pre-cut bands were delivered to the Johns-Manville [redacted] of Local 22, instructed an employee not to work on the bands, as they lacked the identifying labels or decals which would have been affixed had the cutting been done by employees in the Johns-Manville shop (R. 60).* Shrode also informed David, Johns-Manville's job site foreman and a member of Local 22, that he had heard that the bands were pre-cut, and he instructed David not to install bands which did not bear identifying labels (R. 183; 62; 71–72). When David went to the job site at Texas City he found that the bands bore no labels. Concluding, therefore, that they could not have been cut by Johns-Manville employees, he told Roberts, contract manager for Johns-Manville, that the bands would not be installed. Roberts then called Shrode, who confirmed David's refusal (R. 62–63; 64–65). While Techalloy was a non-union employer (R. 13), Local 22 had never before protested the use of Techalloy

*These decals, which were distributed by the unions involved here, were gummed so that they could be affixed to insulation products, and bore a number identifying the shop where the material was finished (R. 180, n. 3). See the discussion *infra*, pp. 17–20.

products; nor did it refuse on this very project to install Techalloy products which had not been pre-cut (R. 260; 61; 86–87).

3. Local 113 of the International Association of Heat and Frost Insulators and Asbestos Workers represents insulation employees in Victoria, Texas, where Armstrong had the insulation contract in connection with the construction of an ammonia plant.[3] In the initial stages of this project, Armstrong, as was its customary practice, purchased straight lengths of asbestos materials from Thorpe Products Company (R. 200; 39, 44). These straight lengths were traditionally cut to make mitered fittings[4] by Armstrong employees in Houston—members of Local 22—and were then installed by Armstrong employees at the job site—in this instance members of Local 113. Cutting the straight lengths to size was work which Armstrong employees had performed in the past, and which Local 22 claimed for its Houston employees by virtue of the no-subcontracting provision of its collective bargaining agreement (R. 220; 35; 38–39; 49–50).[5]

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[3] Local 22 represents Armstrong's employees in Houston and Texas City, Texas.

[4] A mitered fitting is "an insulation item that is used to cover something other than a straight piece of pipe in a pipe line, and this is made by taking standard insulation pipe covering and cutting it on a bias or miter and then gluing it together or sticking it together so that it will conform to the fitting that you are trying to shape it to" (R. 5).

[5] The agreement between Local 22 and the Association also provided that member insulation contractors, when operating outside the Local's jurisdiction, should "abide by the rates of pay, rules and working conditions established by collective

In July 1963, Graham, foreman of the insulation work at the Victoria project and a member of Local 113, called Foster, branch manager for Armstrong, and informed him that certain mitered fittings would not be installed by members of Local 113, as they bore no identifying labels (R. 180; 22). Foster consulted Eaton, business agent of Local 113, who informed Armstrong's representatives that the fittings would not be installed unless he received assurance that the work performed on them had been done by Armstrong shop employees in Houston (R. 182, 201; 108–110). In response to Eaton's request for "proof" that Armstrong's Houston employees had performed the work, a letter was sent to Eaton by Lunda, Armstrong's District Manager. The letter contained the requested assurance (R. 116–117), and the fittings were apparently applied (R. 181–182; 201; 110.)[4]

In early August 1963, Armstrong, for the first time, purchased from Thorpe fittings on which the

bargaining agreements between the [local] insulation contractors and the local union in that jurisdiction." Local 113's collective bargaining agreement, in turn, contained a ban on subcontracting identical to that in Local 22's agreement with the Association (R. 700; 132–133; 62).

[4] This material arrived at the job site without labels because the Association had previously taken the position that the union's labeling system could not be used in shops of member contractors. A meeting between representatives of Local 22 and the Association was held on June 3 to discuss this problem, at which Baker, secretary of Local 22, explained that the union was not "married to the decal" but that it was the best means of identifying the contractor who had performed fabrication work on manufactured products (R. 46–47; 91–93). Nevertheless, the Association sought to prohibit labeling in its shops, but apparently changed its mind after several work stoppages (R. 181, n. 5).

mitering work customarily done by Armstrong employees had already been performed by Thorpe (R. 200; 6; 54–55). These fittings arrived at the job site without the identifying labels which would have shown that the mitering had been done by Armstrong's Houston employees. As in July, Local 113 instructed Armstrong's jobsite employees to refuse to install these fittings because they bore no identifying labels (R. 181–182; 201; 53, 54).[7] Although Thorpe was a non-union employer, Local 113 had not in the past protested the use of Thorpe products (R. 36; 6).

B. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board concluded that Locals 22 and 113 had refused to install the pre-cut and mitered products of Techalloy and Thorpe, not because they were manufactured under non-union conditions, but because the use of those prefabricated products deprived Johns-Manville and Armstrong employees of work they had customarily performed and which they claimed under the no-subcontracting provision in Local 22's agreement with the Association. The Board held that the unions' inducement of the Johns-Manville and Armstrong employees was thus lawful primary activity—not secondary activity proscribed by Section 8(b)(4)(B) of the Act.[8] Accordingly, it

[7] The fittings were installed on September 16, 1963, when an injunction in this case was obtained pursuant to Section 10(*l*) of the Act. *Potter* v. *International Ass'n of Heat and Frost Insulators and Asbestos Workers, AFL–CIO, et al.* (S.D. Tex., Houston Div., Civil No. 63–H–452) (R. 181).

[8] The Trial Examiner assumed that "this was not a boycott of non-union products" (R. 184). But he found the provision upon which the unions had based their demand that the

dismissed the unfair labor practice complaint (R. 201–203).*

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, finding that the no-subcontracting clause of the pertinent collective bargaining agreement was intended to preserve for the employees covered by the agreement work which they had traditionally performed, held that such clause did not violate Section 8(e) of the Act, since that provision was only applicable to so-called "hot cargo" and similar clauses which have a secondary objective (R. 240–241). The court further found that substantial evidence supported the Board's finding that the

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products not be used at the job site unlawful under Section 8 (e), since not within the construction industry proviso (or exemption) to that section. Stating that "the exemption to Section 8(e) applies only to work to be done at the jobsite," the Examiner concluded that it did not privilege the unions' action since the "mitering and cutting even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite" (R. 185). In so concluding the Examiner regarded the provision in question as one "clearly * * * aimed at the exemption of Section 8(e) * * *" (R. 186). The Board reversed the Examiner's finding of unfair labor practices (R. 198), and, in so doing, regarded the construction industry proviso as wholly irrelevant. As we show (see note 11, *infra*), the Examiner's premise that the proviso has applicability here is erroneous.

* The Board's General Counsel had issued a complaint against Locals 22 and 113 and the International with which they were affiliated. Board Member Leedom, dissenting in part, agreed with the majority that the complaints against the International and Local 22 should be dismissed, but would have found a violation of the Act on the part of Local 113. Member Leedom considered controlling the fact that Local 113 sought to protect work not for its own members but for employees represented by Local 22 (R. 203–204).

unions' objective in inducing the employees of Johns-Manville and Armstrong not to handle certain products of Techalloy and Thorpe was to preserve work for the employees covered by the agreement, and not to put pressure on Techalloy and Thorpe because they were non-union employers (R. 237–240). The court therefore concluded that Local 22's attempt to enforce the no-subcontracting clause was not secondary activity proscribed by Section 8(b)(4)(B) of the Act, and accordingly sustained the Board's dismissal of the complaint against Local 22 (R. 241).

But the court of appeals held that the Board had erred in dismissing the complaint against Local 113 (R. 241–242). Since that union was neither a party to Local 22's agreement nor attempting to preserve work for its members, Local 113 had, in the view of the court, an insufficient interest to justify its work stoppage, which necessarily had an impact on the supplier of the prefabricated materials (Thorpe). The court remanded the case to the Board for the entry of an appropriate order against Local 113, and for consideration of whether the International had participated in Local 113's work stoppage, a question not decided by the Board since it dismissed the complaint (R. 243).

SUMMARY OF ARGUMENT

I

The agreement between the Association and Local 22 contained a clause prohibiting the contracting out of work ordinarily performed by the employees covered by the agreement. Such a work preservation clause does not violate Section 8(e) of the Act. As shown in our brief in *National Labor Relations Board*

v. *National Woodwork Manufacturers Ass'n*, No. 111, this Term,[10] Section 8(e) was intended to encompass "hot cargo" and other similar clauses which have a "secondary" objective, i.e., where the union has no dispute with the contracting employer, but uses the agreement with him as a device for exerting pressure on some other employer; it was not designed to interdict work preservation clauses that are "primary" in nature, *i.e.*, whose objective is not to put pressure on some other employer, but to protect the terms and conditions of employment of the contracting employer's own employees. Accordingly, the court of appeals correctly concluded that the no-subcontracting clause in the Local 22-Association agreement was not unlawful under Section 8(e).[11]

Similarly, the objective of Local 22 and Local 113, in inducing the employees of Johns-Manville and Armstrong (who were both parties to the Association agreement) to refuse to handle products which had been worked on in violation of the work preservation clause of that agreement, was lawful. We show in our brief in *National Woodwork Manufacturers Ass'n v. National Labor Relations Board*, No. 110, this Term,

[10] Copies of the Board's briefs in No. 111, and in the companion case, No. 110, have been served on counsel for the Association.

[11] The Association's basic position (Pet. No. 206, 10–12) is that, since the clause was not limited to work to be performed on the job site (but would also encompass work performed in the employers' shops), it exceeded the terms of the construction industry proviso to Section 8(e). However, as the court of appeals properly held (R. 240–241), and as we show in our brief in No. 111 (pp. 32–36), since a work preservation clause of the type here is not within Section 8(e) to begin with, it is irrelevant that it does not satisfy the terms of the proviso.

that Section 8(b)(4)(B) of the Act, like Section 8(e) with respect to agreements, proscribes only secondary, and not primary, activity. We further show there that, where, in the circumstances here, a union which has a lawful work preservation agreement brings pressure to bear against an employer who is a party to that agreement for the purpose of enforcing the agreement, the union action is primary and does not violate Section 8(b)(4)(B). Accordingly, since, as shown below, the court of appeals correctly concluded that substantial evidence supports the Board's finding that Local 22 and Local 113, in inducing the employee refusals, were merely seeking to enforce the work preservation cause of Local 22's agreement with the employers, and not to exert pressure on any third parties, the Board's dismissal of the complaint against Local 22, upheld by the court of appeals, was proper.

II

Contrary to the view of the court of appeals, the action of Local 113, in aiding Local 22 to enforce its work preservation clause against Armstrong was likewise primary activity, and thus outside the ban of Section 8(b)(4)(B), although Local 113 was not a party to the Local 22-Association agreement. Employees of Armstrong were represented both by Local 22 and by Local 113. Under the Local 22-Association agreement Armstrong agreed, when performing work outside Local 22's geographical jurisdiction, to abide by the existing rules and conditions of employment established by collective bargaining agreements between the insulation contractors and the sister locals

having territorial jurisdiction in the particular area. Local 113's agreement with contractors within its territorial jurisdiction contained an absolute ban on subcontracting identical to that contained in the Local 22-Association agreement. Local 113's refusal, just like Local 22's, was aimed solely at Armstrong and was directed simply toward preserving for Armstrong's employees work which they had traditionally performed. Since Local 113 had no secondary objective, its activity was lawful under Section 8(b)(4)(B).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNIONS' OBJECTIVE, IN INDUCING THE REFUSALS TO INSTALL CERTAIN PREFABRICATED MATERIALS, WAS A PRIMARY AND THEREFORE LAWFUL ONE—TO PRESERVE WORK FOR THE EMPLOYEES COVERED BY LOCAL 22'S AGREEMENT WITH THE EMPLOYERS—AND WAS NOT DIRECTED AGAINST NON-UNION PRODUCTS OR OTHERWISE SECONDARY IN NATURE; THAT ACTIVITY, THEREFORE, WAS NOT PROHIBITED BY SECTION (8)(b)(4)(B) OF THE ACT

The Board found that the objective of Local 22 and Local 113, in inducing the employees of Johns-Manville and Armstrong to refuse to install the prefabricated Techalloy and Thorpe products, was to preserve work for the employees covered by Local 22's agreement with the insulation contractors, pursuant to the no-subcontracting clause of that agreement—not to boycott those products because they were non-union (R. 201, 184). Substantial evidence on the whole record supports this finding, and therefore, contrary to the Association's contention (Pet. No. 206,

13–14), the court of appeals correctly sustained that finding.[12]

Thus, Armstrong Branch Manager Foster testified that Thorpe previously supplied straight-lined pipe covering which, after it had been mitered by Armstrong employees, had been installed by other employees of that company (R. 35, 39, 40). Further, he testified that the only occasion on which Armstrong employees had refused to install Thorpe products was when Thorpe supplied mitered fittings—fittings on which the work preparatory to installation had been performed by Thorpe, rather than Armstrong, employees (R. 36; 39–40). Similarly, it was admitted by Johns-Manville Contract Manager Roberts that, when Techalloy bands had been brought to the job site in coils and cut by Johns-Manville employees, there was no objection to the use of those bands by the union; the only objection occurred when Johns-Manville sought to use pre-cut bands which it had obtained from Techalloy (R. 68). The same admission was made by Techalloy Sales Manager Cook (R. 14–15).

It is plain from this testimony that the reason for the unions' refusal to install Thorpe mitered fittings and Techalloy pre-cut bands was not because Thorpe

[12] As this Court pointed out in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488, the requirement that the reviewing court canvass the "whole record" does not mean that it "may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." As shown below, the Board's factual conclusions were reasonable, and therefore the court below properly applied the *Universal Camera* standard in upholding them.

and Techalloy were non-union manufacturers, but because the use of *mitered* fittings and *pre-cut* bands deprived Armstrong and Johns-Manville employees of prefabrication work customarily performed by them. As properly found by the Board, the unions' objective underlying these refusals was a lawful one; since a lawful clause of the agreement between Local 22 and the two employers barred the contracting out of such work, the unions had a legitimate, primary dispute with those employers.

The other factors relied on by the Association do not require a contrary conclusion:

1. Baker, an officer of Local 22 and vice-president of the International, initially testified that he had instructed the men not to handle the products of Thorpe and Techalloy because "we are not in agreement with Thorpe or Techalloy" (R. 79). The Association contends that this reveals that the unions were opposed to those products because they were non-union. But, as the court below correctly concluded (R. 237–238), "the Board was not required as a matter of law to accept [this] statement as gospel in the face of ample testimony, including later testimony by Baker himself,[18] to the effect that the unions objective was work preservation and in the face of the undisputed testimony that although Thorpe and Techalloy were non-union employers, neither local

[18] Baker further testified (R. 87) that the only time Local 22 refused to handle Techalloy products was when they were prefabricated. He also stated that the union had refused to handle prefabricated fittings when they arrived on a job being performed by Industrial Insulators (R. 84–86; see *infra*, p. 19).

union had ever protested the use or application of any of their other products purchased by Johns-Manville or Armstrong but only protested the pre-cut bands and pre-mitered fittings."

Nor does the conclusion that Baker's earlier testimony is outweighed by his later testimony and the other evidence in the record ignore the fact that Section 8(b)(4)(B) applies so long as "an object" of the union's conduct is secondary (see Pet. No. 206, 13–14). Accepting this conclusion, as proper application of the *Universal Camera* standard requires (see note 12, *supra*), this is not a case where the union had two objects, one lawful and the other unlawful. Under the Board's finding, sustained by the court below, Baker's testimony as a whole revealed only a single, primary object, i.e., work preservation.[14]

[14] As the court below added (R. 238): "It may well be that the union officials hoped and expected * * * that a result of their members' refusal to use and apply the [prefabricated] bands and fittings [would be] to put pressure on Techalloy and Thorpe as nonunion employers. But hopes and expectations do not necessarily constitute 'objects'. An illegal 'object' is something more than the result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend." See *Local 761, Electric Workers v. National Labor Relations Board*, 366 U.S. 667, 672–673; Bd. Br. in No. 110, pp. 14–15, n. 10.

The Association also argued in the court below that the Board's finding that the unions' object was work preservation was "incongruous", in view of the testimony that they had installed prefabricated materials without complaint on other occasions. But the testimony on which the Association relied was either contradicted or inconclusive. Thus, while Foster, of Armstrong, testified that Armstrong had purchased prefabricated fittings from Thorpe on previous occasions (R. 44–45), he did not testify about the union's reaction to this. Further-

2. The fact that the unions refused to install prefabricated materials unless they bore identifying labels likewise does not undermine the Board's finding that the unions had a work preservation objective. As the court below noted (R. 238): "The use of decals is in itself a neutral fact. The decals could be used as a means of boycotting non-union goods or they could be used as a means of policing the ban on subcontracting. There is ample testimony in the record to support the conclusion that in this case the decals were used to police the ban on subcontracting."

Thus, the facts show that Johns-Manville and Armstrong had an agreement with Local 22 which provided in effect that the work of cutting or fitting to size or shape certain manufactured products, in order to meet the specifications of a particular job, would be done by their employees. Both of these employers had employees at their shops in Houston as well as at the various job sites, and this cutting and fitting work was generally carried on in the shops.[15] In

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more, Thorpe President Sheldon and Armstrong Victoria Project Superintendent Williams contradicted this testimony (R. 54, 55). Similarly, the testimony of Johns-Manville Contract Manager Roberts that his employees had used pre-cut aluminum bands in the past (R. 63, 67) was weakened by his further testimony (R. 67–68) that he did not know whether the union was aware of this fact. Moreover, Local 22 Business Agent Shrode testified that the union had not known of the use of pre-cut aluminum bands, and that, had it known, it would have objected (R. 106).

[15] The work involved in the Armstrong dispute, for example, was customarily performed in Armstrong's Houston shop, since the saw used in cutting the insulation material to the proper "L" shape was too large and expensive to be readily transferred to the job site (R. 49).

order to police the no-subcontracting provisions, the Johns-Manville and Armstrong jobsite employees who were to install the products in question had to be able to ascertain whether the labor performed on these products had been performed by shop employees of those companies, or by employees of some other employer.

The unions solved this problem by utilizing labels (or decals) numbered serially, which they delivered to the shops.[16] When work was performed on a manufactured product in the shop, either the shop employee who did the work or some other designated individual affixed a label to that product before it was sent to the job site (R. 89–90). When a prefabricated product was delivered to the job site, the foreman called the business agent and gave him the label number (R. 73). Since the business agent kept a record of which numbered labels came from which shops, he could tell the foreman whether the prefabrication work had been done in his own employer's shop or had been subcontracted to some other employer.

Labels were delivered only to the shops of insulation contractors who were members of the Association and thus parties to the agreement with the union, and who were therefore bound by the no-subcontracting clause (R. 97–98). Significantly, the label alone did not authorize the jobsite employees to install the product. They first had to ascertain, by checking the number on the label, in what particular shop the prefabrication work had been performed (R. 90–91). If

[16] The labels, which were gummed, came in rolls like stamps and were backed by waxed paper which was removed when the label was affixed to a product (R. 88–89).

the work had been performed by the shop employees of some employer other than their own, the jobsite employees would not handle those products even though the prefabrication had been performed in a unionized shop. Indeed, when prefabricated fittings were brought to the job site of Industrial Insulators, an employer covered by the agreement with Local 22, its employees were instructed not to install the fittings *despite the fact that they bore a label.* There the serial number showed that the prefabrication work had been performed by employees of a contractor, albeit a unionized contractor, other than Industrial Insulators (R. 89–86). Similarly, it is undisputed that premolded fittings were installed by Armstrong employees *despite the absence of labels,* since the work performed thereon was beyond the capabilities of that company's employees (R. 36–37: 56).[17]

In short, the record shows that the presence or absence of a decal on a product was not the crucial factor in the unions' decision whether to handle that product—as it would have been if the purpose of the labeling system were simply to boycott non-union products. Rather, the relevant factor was whether the products embodied work traditionally performed by the employees covered by Local 22's contract. Hence, products *with* decals *were not* installed if the prefabrication work had in fact been subcontracted;

[17] In this regard, see the pertinent distinction made by the court below (R. 239) between work within the capacity of a contractor's employees and work beyond the skills and never performed by such employees, in defining the scope of union action properly justifiable pursuant to a valid work preservation clause; see also note 18, *infra.*

and products *without* decals *were* installed if it could otherwise be determined that no prefabrication work had been subcontracted. Decals were simply a convenient way of ascertaining, in the usual case, whether shop employees had performed the prefabrication work which, under the work preservation clause of the Local 22-Association agreement, they were entitled to perform.

3. Finally, the Board's finding that the unions' objective here was simply work preservation is not inconsistent with the fact that, in other cases involving the same International Union and various of its locals, the Board had found a secondary object. These cases are clearly distinguishable, for the reasons given by the court below (R. 239–240).[18]

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[18] Three of the cases—*International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 24 (Speed-Line Mfg. Co.)*, 137 NLRB 1410; *International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 125 (Insul-Coustic Corp.)*, 139 NLRB 659; and *International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 2 (Speed-Line Mfg. Co. and Fibrous Glass Products, Inc.)*, 139 NLRB 688—involved "premolded" fittings, not "prefabricated" ones, as were involved here. As the court below noted (R. 239): "The distinction * * * is crucial, for prefabricated fittings are essentially hand made and * * * customarily had been prepared by members of International's local unions, whereas premolded fittings are factory made with the use of heat and heavy machinery to produce curved or "L" shaped insulation * * *. Thus, in the cases cited above the Board quite reasonably concluded that in objecting to the use of premolded fittings the unions were not in fact seeking to obtain work claimable under their contracts but instead were objecting to the non-union status of the manufacturers of the premolded fittings." Moreover, in each of those cases, unlike here, there was ample evidence that the union objected to the use of premolded fittings simply because they were not union made. See

In sum, substantial evidence supports the Board's finding that the unions' objective, in inducing the refusals to handle the Techalloy and Thorpe products, was to preserve work for the employees covered by Local 22's agreement with Johns-Manville and Armstrong, in accordance with the no-subcontracting clause of that agreement. Hence, the action by Local 22 was clearly primary, and, under the analysis developed more fully in our brief in No. 110 (pp. 8–15), was thus outside the ban of Section 8(b)(4)(B) of the Act. As shown hereafter, the same conclusion holds true for the action of Local 113.

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137 NLRB at 1411, 1413; 139 NLRB at 689–690; 139 NLRB at 660.

The more recent case of *Local 22, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers (Mundet Cork Co.)*, 150 NLRB 1626, is also distinguishable on its facts. There the union, after initially refusing to install aluminum jacketing not bearing a union decal for an insulation contractor (Mundet), agreed to do so when it learned that the jacketing had been cut to size and prefabricated by a Johns-Manville employee represented by the union (150 NLRB at 1633). The union never protested that Mundet was depriving its own employees of work (*ibid.*). Furthermore, the Board found that the particular jacketing had not in the past been fabricated by Mundet's employees and that Mundet did not even have the equipment for its fabrication (*ibid.*). In light of these findings, the court below properly concluded (R. 240) that there was no inconsistency between the Board's holding here and its holding in *Mundet* that the union's objective in initially refusing to install the unlabeled jacketing was not to preserve work for Mundet's employees, but rather to insure that the product was made by *union* employees.

II. LOCAL 113'S ACTION IN ASSISTING LOCAL 22 TO ENFORCE THE WORK-PRESERVATION CLAUSE OF ITS AGREEMENT WAS PRIMARY AND OUTSIDE THE SCOPE OF SECTION 8(b)(4)(B), ALTHOUGH LOCAL 113 WAS NOT A PARTY TO THAT AGREEMENT

Section 8(b)(4)(B) of the Act bars a union from exerting pressure against a neutral, "secondary" employer, for the purpose of forcing him to cease doing business with the employer with whom the union has a dispute or otherwise disfavors. A proviso to that section expressly permits "any primary strike or primary picketing."[19] Assuming—as the court below found—that the no-subcontracting clause in Local 22's agreement with the Association had the lawful, primary objective of preserving work for those Armstrong employees who were represented by Local 22, a refusal to install prefabricated materials by those employees, in the event Armstrong breached the agreement, would not, in the circumstances here, violate Section 8(b)(4)(B). Yet, at the same time, the court below held that an identical refusal to perform work by members of another union—Local 113—representing other Armstrong employees, though intended only to assist in securing enforcement of their fellow employees' lawful agreement, was secondary and thus violated the Act.

The court reasoned that, since Local 113 was not seeking to obtain work for the employees it represented, and was not a party to Armstrong's agreement with Local 22, its interest was "too weak" to privilege

[19] See Bd. Br. in No. 110, p. 9, n. 4, for a discussion of the the effect of this proviso.

its refusal to work, which necessarily had an impact on Thorpe, the employer from whom Armstrong purchased the prefabricated materials (R. 241–243). But if Local 113 was engaged in legitimate, primary activity, it is irrelevant that an incidental effect of that activity may have been to put pressure on Armstrong to cease doing business with Thorpe (see *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 673–674); and, on the critical issue of whether the activity was primary or secondary, it is not dispositive that Local 113 neither was seeking to preserve work for its own members nor was a party to Local 22's agreement.

The correct test, we submit, is whether the refusal to work was directed at the employer with whom Local 113 had a dispute or whether its actual objective was to conscript that employer in a campaign directed at a third party. Plainly, it was the former. There was no dispute with the third party, Thorpe, the supplier of the prefabricated materials, although Thorpe may incidentally have been affected.[20] The dispute was with Armstrong, and Local 113 limited its activity to Armstrong employees at their job site. Indeed, in view of the common economic interest among all employees working for the same employer, Local 113's work stoppage was a classic instance of "concerted activities for * * * mutual aid or protection," which

[20] Nor was there any dispute with, or purpose of exerting pressure on, the owners of the construction projects. Cf. Bd. Br. in No. 110, p. 17. Here there was no evidence of any desire on the part of the project owners in regard to the use of prefabricated materials.

are protected by Section 7 of the National Labor Relations Act (App., *infra*, p. 31).[20a]

Local 113 represented some of Armstrong's employees, as did Local 22. The activity of each union was designed to protect and preserve the contractual rights of certain of Armstrong's employees—those at the Houston shop who were members of Local 22. That the work of the particular employees represented by Local 113 was not involved is irrelevant in determining whether that union's activity was primary or secondary. Under the Local 22-Association agreement Armstrong agreed, when performing work outside Local 22's geographical jurisdiction, to abide by the existing rules and conditions of employment established by collective bargaining agreements between the insulation contractors and the sister locals in the particular area (see note 5, *supra*). Local 113's agreement with contractors within its territorial jurisdiction contained an absolute prohibition on subcontracting of work traditionally performed by its members identical to that contained in the Local 22-Association agreement. Local 113's refusal to install prefabricated materials, just like Local 22's, was directed toward preserving for Armstrong employees work which they had traditionally performed. In other words, some employees of Armstrong sought to assist other employees of the same company in effectuating rights which they had bargained for and to which they were entitled under the pertinent collective bargain-

[20a] Thus, had Local 22 and Local 113 represented different bargaining units in an industrial plant, it would seem clear that Local 113 (absent a restriction in its agreement in this regard) could lawfully support a strike called by Local 22 (see n. 24, *infra*).

ing agreement. That Local 113 was not a party to the Local 22-Association agreement does not automatically make its activity secondary. Its objective was still primary in nature, and indeed was identical to Local 22's.

There is no need to indulge in any third-party beneficiary or agency analysis.[21] It is enough to say, as did the Board, that employees of Local 113 could lawfully insist that Armstrong abide by and adhere to the no-subcontracting clause of the Local 22-Association agreement. In other words, some of Armstrong's employees could properly seek to require their employer to live up to a valid agreement which had as its objective the preservation for fellow employees of work which they had traditionally performed for Armstrong. Under the circumstances here, the contractual right of Armstrong's Houston shop employees might otherwise be rendered nugatory. Indeed, the rather formalistic approach of the court below on this question would result in an anomalous situation—had both the shop employees and the jobsite employees been members of Local 113, or had both groups been represented by Local 22, the court below would have found the refusal by the jobsite employees to

[21] Although the Board in its majority opinion made passing mention of third-party beneficiary and agency concepts (R. 202, n. 7), it is not at all clear, contrary to the apparent view of the court below (R. 242), that the Board grounded its decision on this point on either or both of those concepts. Rather, the Board simply stated that Local 113 "had the right to insist * * * that Armstrong adhere to the lawful no-subcontracting clause" of the Local 22-Association agreement, and that "Armstrong had thus violated the no-subcontracting clause of its contract and Local 113's conduct was therefore lawful" (R. 202, n. 7).

perform lawful and outside Section 8(b)(4)(B); it reached a different conclusion solely because each group happened to be represented by a different local.

As noted earlier, the parties attempted to provide for a circumstance such as here presented in their collective bargaining agreement. Armstrong agreed to abide by the provisions of the pertinent agreements in areas within the territorial jurisdiction of other locals, and, as mentioned, Local 113's agreement contained a ban on subcontracting identical to that in the Local 22-Association agreement. Armstrong should not be permitted to negate the rights bargained for by the parties to this agreement because of the fortuitous circumstance that its jobsite employees were members of a different local from that of which its shop employees were members, particularly where the parties attempted to provide for this situation in the agreement preserving work for the shop employees.[22]

In our view, it is simply incorrect to conclude that members of Local 113 *could not* have had a dispute with their employer over a matter affecting other em-

[22] Contrary to the view of the court below (R. 242), Local 113 had more than just an "emotional interest" in assisting Local 22 in enforcing the work preservation clause of its agreement with Armstrong. Local 113's members had a real, though perhaps indirect, "economic interest," in coming to the aid of their fellow employees. Local 113 had an identical ban on subcontracting in its agreement, the viability of which it had a substantial interest in protecting. If the employer of Local 113's members could disregard with impunity a similar no-subcontracting restriction protecting other employees who were members of a sister local, Local 113 might be adversely affected when and if it should attempt to assert and rely upon the restriction in its own agreement. Local 113's interest in the matter thus had significant economic underpinnings.

ployees of that employer. Local 113 *did* have a legitimate dispute with Armstrong—over its failure to abide by its agreement to preserve work traditionally performed by fellow employees who were members of Local 22. Wholly apart from Local 113's indirect economic interest in the matter (see note 22, *supra*), it could properly come to the aid of its members' fellow employees—a union does not have to act selfishly to act lawfully.

Properly considered, Section 8(b)(4)(B) is directed at the situation where a union exerts pressure on one employer in order to further a dispute with another employer or because it otherwise disfavors such other employer. That section was not intended by Congress to reach the converse situation where two unions have a dispute with a single employer and seek to exert pressure on that, and no other, employer. Indeed, in several cases involving analogous situations, the Fifth and Seventh Circuits have applied this principle. In *National Labor Relations Board* v. *General Drivers, Local 968 (Otis Massey Co.)*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914, the court of appeals held that the union representing Otis Massey's warehousemen and truck drivers had not exceeded the bounds of legitimate primary activity when, in furtherance of a dispute with Otis Massey involving the latter employees, it picketed the project where Otis Massey's construction employees, who were represented by other unions, were at work. The court emphasized that a contrary ruling would isolate "other employees of that same primary employer from exercising their statutory right under Section 7 * * * to

engage in mutual aid and protection and make common cause with their co-workers" (225 F. 2d at 210)." Similarly, in *Milwaukee Plywood Co.* v. *National Labor Relations Board,* 285 F. 2d 325 (C.A. 7), a union which represented the employees of a parent company, in furtherance of a dispute with that company, picketed a subsidiary located in another city. The relationship between the two companies was sufficiently close to make them one employer. A second union, representing the employees of truckers making deliveries to the subsidiary, joined the picket line and induced a stoppage of deliveries. The Seventh Circuit upheld the Board's finding that the second union, by thus aiding the first, had not exceeded the bounds of lawful primary activity.[24] Consistent with these deci-

[23] Since the court below in the instant case was the Fifth Circuit, the panel which rendered the decision below at least impliedly rejected the approach taken in the *General Drivers* case, discussed above.

[24] See also *United Ass'n of Journeymen, Local 106 (Columbia-Southern Chemical Corp.)*, 110 NLRB 206. There, the Pipefitters Union, which had a dispute with Westheimer, picketed at a highway leading to the premises of Columbia-Southern where Westheimer was relocating a boiler. Two other unions—the Teamsters and the Operating Engineers—which represented some of Westheimer's employees induced these employees to stop work. The Board found that the action of the Teamsters and the Operating Engineers was privileged primary activity and thus not violative of Section 8(b)(4)(A) (now Section 8(b)(4)(B)), despite the fact that those unions did not themselves have any dispute with Westheimer. The Board stated (110 NLRB at 209–210):

> * * * [A]s we read the legislative history of the provisions of Section 8(b)(4)(A) * * *, Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union. Since Westheimer was not a disinterested employer, but the one

sions, the analysis set out above is proper, we submit, in situations, such as here, where two unions have a dispute with one and the same employer.

In short, we urge here, as in our brief in No. 111 (pp. 10–13), that the secondary boycott and related hot cargo provisions of the Act apply only where the work stoppage or contract provision is aimed not at the employer of the employees immediately involved, but at some other employer who, in the dispute between the union and the first employer—though he takes the brunt of the union's pressure—is really a neutral. Here, there is no question that Local 113's dispute was with the contractor (Armstrong) rather than with the employer (Thorpe) who furnished the prefabricated materials, and that the refusal to perform by Armstrong's employees was for the object of exerting pressure on Armstrong, and on no one else. Even though these employees were not as directly aggrieved as those whose local was a party to the agreement containing the work preservation clause in question, Local 113 in any event had no secondary objective. Here, in our view, the existence of a legitimate dispute and the absence of a secondary objective renders Section 8(b)(4)(B) inapplicable. Therefore, the Board's finding that the action of Local 113 was primary and thus outside the ban of Section 8(b)(4)(B) was proper. Accordingly, we submit, the court below erred in reversing the Board's dismissal of the complaint against Local 113.

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whose labor relations policies had kindled the dispute herein, we find that any appeals by Teamsters or Operating Engineers to Westheimer's employees to respect Pipefitters' picket line would not contravene Section 8(b)(4)(A) * * *.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed insofar as it sustains the Board's dismissal of the complaint against Local 22, and should be reversed insofar as it sets aside the remainder of the Board's order.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29, U.S.C. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using,

selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain fom handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in

this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or sub-contractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

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